

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KENITH D. MOORE)	
Claimant)	
VS.)	
)	Docket No. 202,720
BOEING COMPANY)	
Respondent)	
AND)	
)	
AMERICAN MANUFACTURERS MUTUAL)	
INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

The claimant appeals from the Award of Administrative Law Judge Jon L. Frobish dated December 18, 1997. Oral argument was held July 10, 1998, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Did the Administrative Law Judge, as a matter of law, err in his decision that claimant is not entitled to permanent partial disability benefits in accordance with K.S.A. 44-501(c)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant, a long-term employee of respondent, began developing bilateral hand and wrist problems in late 1992. These problems worsened to the point where he developed bilateral carpal tunnel syndrome and osteoarthritis of the thumbs. He was also later diagnosed with bilateral ulnar cubital tunnel syndrome and left radial nerve entrapment.

Claimant continued working for respondent at his regular job until June 30, 1995, at which time claimant elected to take early retirement. Claimant acknowledged the early retirement included a severance package which paid him additional monies, but also testified that the decision to retire stemmed primarily from the fact his hands continued to hurt and he found it painfully difficult to perform his job duties.

Claimant was referred to Dr. J. Mark Melhorn, an orthopedic surgeon, on June 20, 1995. Dr. Melhorn found claimant to have bilateral carpal tunnel syndrome and bilateral osteoarthritis in his thumbs. Dr. Melhorn returned claimant to his employment at Boeing, and provided no restrictions at that time. Dr. Melhorn continued treating claimant for several months, and did ultimately acknowledge, in his September 1997 report, that claimant was at increased risk for carpal tunnel syndrome in the future.

Claimant acknowledged he missed no work as a result of these symptoms through his last day worked of June 30, 1995. Claimant argues, however, that the retirement was not a voluntary retirement, but instead was the result of claimant's bilateral hand and arm problems. Respondent argues, on the other hand, that claimant's voluntary retirement was for the purpose of obtaining the additional compensation offered through the severance package. Respondent further argues that accommodation could have been made to the limitations that were ultimately placed on claimant by Dr. Pedro Murati in 1997.

The Appeals Board adopts the opinion of Dr. Murati over that of Dr. Melhorn in this instance. It is unrealistic to admit that a claimant's job caused his injury and that claimant is at increased risk for injuries in the future, while refusing to provide work restrictions.

The Administrative Law Judge, in the Award, applied K.S.A. 44-501(c) and the policies of Osborn v. Electric Corporation of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. ____ (1997), which disallows any benefits with the exception of ongoing medical treatment unless the injury disables the employee for a period of at least one week from earning full wages at the work at which the employee was employed. The Administrative Law Judge concluded that claimant was never found unable to perform substantial and gainful employment by a physician, respondent was never made aware of the need to accommodate claimant until after he retired, there was no evidence in the record that claimant lost the ability to earn full wages for a week, and the employer was never given the opportunity to accommodate claimant. The Administrative Law Judge found it significant that claimant alone made the decision to terminate his employment.

Claimant acknowledges the decision to retire was his and his alone. He, however, does testify, and his testimony is uncontradicted that, had his hands not hurt, his decision to retire would not have been made. He would have continued working with respondent in his then current employment, and would have delayed retirement until into the future, regardless of the offered severance package and additional monies.

CONCLUSIONS OF LAW

K.S.A. 44-501(c) states in part:

. . . the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.

Respondent acknowledges claimant terminated his employment on June 30, 1995, taking early retirement. Claimant's allegation that his hands were simply too painful to continue working is uncontradicted. It is further uncontradicted that claimant would have continued working with respondent had he not encountered the difficulties with his hands, wrists, and arms. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

In Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996), the Kansas Court of Appeals found K.S.A. 44-501(c) to be plain and unambiguous, that compensation to an injured employee is limited to medical expenses if the employee is not disabled for at least one week from earning full wages at the work for which he or she is employed.

The Appeals Board must decide whether claimant's voluntary termination of employment to take early retirement is sufficient to qualify claimant as being disabled from earning full wages for at least one week at the work for which claimant was employed. It is uncontradicted claimant left work as a result or at least partly as a result of his physical difficulties stemming from the work-related injuries. It is uncontradicted claimant would not have left work but for these physical injuries suffered at work. It is uncontradicted that claimant suffers from a disability which resulted from his work-related injuries. Neither Dr. Melhorn nor Dr. Pedro Murati, who examined claimant in 1997, found claimant's limitations to be connected to any activity outside his employment with respondent. While Dr. Melhorn acknowledged claimant was at risk due to his ongoing symptoms, Dr. Murati went even further, finding claimant should be restricted from heavy grasping, and restricted to occasional repetitive grasping or repetitive work. He also limited claimant to 20 pounds occasional lift, 10 pounds frequent lift, and 5 pounds constant lift. These restrictions would have prevented claimant from performing his work with respondent.

The purpose of K.S.A. 44-501(c) is to avoid providing benefits to claimants who suffer minor injuries that necessitate no time off work, and which allow claimants to continue working in their regular job. That is not the case in this instance. Here, claimant suffered substantial injury and disability to both of his upper extremities, resulting from his work. He was physically incapable of continuing in his job due to the pain and limitations he experienced. The medical evidence is uncontradicted that claimant was at risk for additional injury and in need of specific work restrictions. For claimant to be forced to remain at work under these circumstances, only to encounter additional pain and injury, would be improper. K.S.A. 44-501(c), as interpreted by Boucher, does not contemplate subjecting claimants to unnecessary pain and suffering, and additional injury.

Here, claimant encountered injury which grew worse with each day. While claimant may not have been provided specific restrictions from a physician, the record ultimately did bear out that restrictions and limitations were in order, and that claimant was at risk in this circumstance.

The parties have acknowledged that, because of K.S.A. 44-501(h), no work disability would be in order in this matter. Only claimant's functional impairment is in dispute. Both Dr. Melhorn and Dr. Murati found claimant to have suffered a permanent functional impairment from these injuries. The Administrative Law Judge, in considering the functional impairment opinions of the two doctors, found claimant to have suffered a 16.5 percent whole body functional impairment. Neither party disputes this finding, and it is adopted by the Appeals Board as its own.

The Administrative Law Judge denied claimant benefits based upon K.S.A. 44-501(c), even while acknowledging the law being applied in this circumstance was draconian. The Appeals Board cannot accept the application of this statute in a fashion which denies a physically damaged employee, who cannot continue his regular job due to

his work-related injuries, a functional impairment. The employee's decision to take early retirement, not for the purpose of personal gain but for the purpose of avoiding additional injury, did disable claimant from earning full wages at his job with respondent. The Appeals Board, therefore, finds that the application of K.S.A. 44-501(c) to this circumstance is error, and the Administrative Law Judge's denial of benefits to claimant beyond medical treatment is reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated December 18, 1997, should be, and is hereby, modified, and claimant, Kenith D. Moore, is granted an award against the respondent, Boeing Company, and its insurance carrier, American Manufacturers Mutual Insurance Company, for a 16.5 percent permanent partial disability to the body as a whole, and based upon an average weekly wage of \$1,029.94.

Claimant is awarded 68.48 weeks permanent partial disability compensation at the rate of \$319 per week in the amount of \$21,845.12, all of which is due and owing at the time of this Award, and ordered paid in one lump sum minus any amounts previously paid.

Claimant is further awarded unauthorized medical expense up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical treatment will be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier as follows:

Deposition Services	
Transcript of Preliminary Hearing	\$131.50
Ireland Court Reporting	
Deposition of Bill Swingle	\$ 97.48
Barber & Associates	

Transcript of Regular Hearing

\$121.10

IT IS SO ORDERED.

Dated this ____ day of January 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Eric K. Kuhn, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director